

STATE OF MICHIGAN
COURT OF APPEALS

CSX TRANSPORTATION, INC.,

Plaintiff-Appellant/Cross-Appellee,

v

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY CO.,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED

April 7, 2000

No. 216522

Saginaw Circuit Court

LC No. 98-022736-CZ

Before: Smolenski, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment for defendant in the amount of \$2,135,500 plus interest and costs, entered in confirmation of an arbitration award. Defendant cross appeals from the denial of its motion for sanctions. We affirm.

On June 22, 1989, a railroad car owned by defendant derailed on a track owned by plaintiff. The derailment caused property damage and a fire that required the residents of Freeland, Michigan, to evacuate for several days. The derailment also resulted in a class action against the parties brought by Freeland residents, as well as other litigation and clean-up costs. The parties agreed to cooperate in resolving all litigation arising out of the derailment, and then to arbitrate any disputes between themselves about their relative degrees of responsibility for the losses incurred. The total losses to the parties were \$5,650,700, of which plaintiff paid \$3,515,200 and defendant paid \$2,135,500. These amounts are undisputed.

The parties executed an arbitration agreement, and plaintiff demanded arbitration under the agreement. Each party chose one arbitrator, and the two arbitrators then chose a neutral arbitrator. The arbitrators were required to have considerable knowledge and experience in the railroad industry. The agreement specified that the arbitrators' decision was final and binding. The arbitrators were instructed to express the relative degrees of fault between plaintiff and defendant on a percentage basis. The arbitrators concluded that plaintiff was 100 percent at fault for the derailment and that the causes of the derailment were uneven track conditions and inadequate side bearing clearances. The arbitrators' decision and award did not include a specific monetary award.

Plaintiff moved in circuit court to vacate the arbitration award, arguing that the arbitrators exceeded their authority by making erroneous decisions of law. Plaintiff also argued that the award should be vacated because one of the arbitrators did not fully participate in deliberations. Defendant then moved to confirm the award and enter a money judgment on it. Defendant also moved for sanctions against plaintiff and for certain deposition testimony to be stricken from plaintiff's pleadings because it was not presented to the arbitrators. The trial court denied plaintiff's motion to vacate the award, and instead granted defendant's motion to confirm the award. The court also entered a money judgment against plaintiff for \$2,135,500. However, the court denied defendant's motion for sanctions and did not rule on defendant's motion to strike.

On appeal, plaintiff first argues that the trial court erred by entering a money judgment on the arbitration award because the award did not provide for money damages. MCR 3.602(L) provides that a court may render judgment giving effect to an arbitration award. Plaintiff's argument is that the court's judgment does not give effect to the arbitration award because the award did not specify damages. This issue involves a question of fact—whether the effect of the arbitration award was to require one party to pay money damages to the other party. We review questions of fact for clear error. *Cipri v Bellingham Frozen Foods, Inc.*, 235 Mich App 1, 12; 596 NW2d 89 (1999). We find no clear error.

Although the arbitration award itself did not specify damages, the parties do not dispute what their respective losses were. The parties instructed the arbitrators to decide their relative fault on a percentage basis. In fact, plaintiff's counsel informed the arbitrators that the parties knew what the damages were and that they would use the percentages of fault as a "multiplier" to apply to the damages. The trial court found that the parties' understanding was that the percentage of fault, as determined by the arbitrators, would determine the share of losses for which each party was responsible. The record supports the court's finding. The parties agreed on damages, and they submitted their dispute over liability to arbitration.

Plaintiff argues that, although it made a demand for arbitration of its claim against defendant for losses incurred from the derailment, defendant made no accompanying claim against plaintiff for its losses. Therefore, according to plaintiff, the arbitration award had the effect of denying plaintiff's claims against defendant, but did not authorize payment of any claim defendant had against plaintiff. Plaintiff insists that a money judgment in favor of defendant was inappropriate because defendant never made a specific claim for damages. Plaintiff relies on Rule 6 of the Commercial Arbitration Rules of the American Arbitration Association. Under that rule, once a party makes a demand for arbitration, the other party may make a counterclaim. Plaintiff contends that defendant did not make a counterclaim, but only defended plaintiff's claim. However, the arbitration agreement provided that arbitration could be initiated under either Rule 6 or Rule 7. Rule 7 applies to arbitration initiated under a submission to arbitrate an existing dispute, while Rule 6 applies to arbitration under a contractual arbitration provision. Here, the parties agreed to arbitrate an existing dispute, and Rule 7 applies rather than Rule 6. Rule 7 does not mention counterclaims. Therefore, plaintiff's reliance on Rule 6 is misplaced.

We conclude that the trial court did not clearly err in finding that the parties agreed that the arbitrators would only determine relative fault on a percentage basis, which would then be used as a

multiplier to the total amount of losses. The record supports the court's application of the arbitrator's decision to determine the amount of the undisputed losses allocated to each party. Therefore, the court appropriately entered a money judgment to give effect to the arbitration award under MCR 3.602(L).

Plaintiff next argues that the trial court erred by confirming the arbitration award because the arbitrators exceeded their authority by making erroneous legal decisions. An award may be vacated if the arbitrators exceeded their authority. MCR 3.602(J)(1)(c). Arbitrators exceed their authority "whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law." *DAIIE v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982). A court's review of such a claim "is restricted to cases in which an error of law appears from the face of the award, or the terms of the contract of submission, or such documentation as the parties agree will constitute the record." *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 175-176; 550 NW2d 608 (1996). "Where it clearly appears on the face of the award or in the reasons for the decision . . . that the arbitrators through an error of law have been led to a wrong conclusion and that, but for such error, a substantially different award must have been made, the award and decision will be set aside." *Id.* at 176.

The arbitrators unanimously concluded that the derailment was caused by track conditions and inadequate side bearing clearances. The arbitrators also concluded that plaintiff was responsible for both defects and was therefore 100 percent at fault for the derailment. Plaintiff argues that the arbitrators' decision was based on errors of law and must be set aside. Specifically, plaintiff contends that, because it complied with federal standards regarding track conditions, the track was not defective as a matter of law. Plaintiff also maintains that the arbitrators erroneously relied on an industry rule to impose responsibility for the side bearing clearances. We disagree.

A review of the face of the arbitration decision and award clearly demonstrates that the arbitrators' decision was based on their evaluation of complex factual evidence. The arbitrators were chosen for their expertise in the railroad industry, and this Court is neither authorized nor well-suited to determine whether their factual conclusions were correct. We may not review the arbitration award to determine whether it was supported by the evidence. *Donegan v Michigan Mut Ins Co*, 151 Mich App 540, 549; 391 NW2d 403 (1986).

Plaintiff asserts that its track was in compliance with federal safety standards, as set forth in 49 CFR § 213 *et seq.*, and that therefore its track, as a matter of law, was not defective. However, 49 CFR § 213.1 expressly recognizes that the regulations are only minimum safety standards. Section 213.1 provides that "a combination of track conditions, none of which individually amounts to a deviation from the [federal regulations], may require remedial action to provide for safe operations over that track." Also, the regulations expressly allow a railroad to adopt more stringent standards. Therefore, the federal regulations recognize that a track may be unsafe although it is in compliance with the federal minimum standards. Thus, the arbitrators' finding that the derailment was caused in part by uneven track conditions on plaintiff's track was not a clear error of law.

The arbitrators also found that inadequate side bearing clearances were a cause of the derailment. The arbitrators concluded that, under Interchange Rule 1(a) of the Association of American

Railroads, plaintiff was responsible for the condition of all cars on its line. Plaintiff argues that reliance on this rule was an error of law because the arbitrators ignored factual evidence that defendant built defects into the car when it reconstructed the car and that defendant delivered the car to plaintiff knowing that it violated plaintiff's clearance requirements. However, the arbitrators examined the evidence and determined that the defect was readily discoverable during normal inspection, but that plaintiff did not discover it. Moreover, the arbitrators were presented with evidence that plaintiff had performed repair work on the car more recently than had defendant. The decision that plaintiff was at fault for the derailment was based on the arbitrators' examination of the evidence in light of their considerable knowledge and experience in the railroad industry.

The trial court correctly recognized that plaintiff, in effect, was seeking to challenge the merits of the arbitrators' decision. "[A]n allegation that the arbitrators have exceeded their powers must be carefully evaluated in order to assure that this claim is not used as a ruse to induce the court to review the merits of the arbitrators' decision." *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991). An arbitration award may not be vacated on the basis of a review of the merits of the decision. *Dohanyos, supra* at 177. Plaintiff's arguments are essentially objections to the merits of the arbitrators' decision. We refuse to review the merits of that decision. The arbitrators were each very experienced and knowledgeable in the railroad industry, and their decision was rendered after considering a vast amount of evidence that the parties presented to them. Plaintiff has failed to demonstrate that the arbitrators acted "in contravention of controlling principles of law." *Gavin, supra* at 434. Therefore, plaintiff has failed to demonstrate that the arbitrators exceeded their authority, and the trial court did not err by failing to vacate the arbitrators' decision and award.

Plaintiff finally argues that the trial court erred by refusing to vacate the decision because one of the arbitrators was excluded from part of the arbitrators' deliberations. Plaintiff claims that the arbitrators exceeded their authority under the arbitration agreement and denied plaintiff due process by conducting deliberations without one of the arbitrators. We disagree.

The arbitration agreement did not specify where or how deliberations were to be conducted. After the arbitration hearing, the arbitrators agreed to deliberate in Key West, Florida. However, the arbitrator selected by plaintiff could not travel to Florida due to an illness in his family. Counsel for both parties agreed that he could participate in the deliberations by telephone conferences. Plaintiff argues that its arbitrator did not in fact participate in all the deliberations. As evidence, plaintiff relies on the bills submitted by the arbitrators. The neutral arbitrator submitted a bill for four days, at eight hours per day, of deliberations in Florida. However, plaintiff's arbitrator submitted a bill that only mentioned two and a half hours of conference calls during the same four-day period. Plaintiff argues that this billing discrepancy demonstrates that its arbitrator did not participate in all the deliberations.

However, the neutral arbitrator submitted an affidavit to the trial court, in which he explained the billing discrepancy. He explained that his standard billing practice when traveling for deliberations is to charge a flat eight-hour rate per day because he is unable to attend to other matters. He also stated that plaintiff's arbitrator was not excluded from any deliberations, but participated fully and drafted a substantial portion of the decision. Moreover, the arbitration decision itself, signed by all three arbitrators, noted that plaintiff's arbitrator, although not physically present, was privy to all discussions

by telephone and facsimile. The decision also noted that counsel for both parties approved of this process beforehand.

Under these circumstances, the trial court did not err in concluding that all three arbitrators participated fully in the deliberations. This is a finding of fact that we may reverse only if clearly erroneous. MCR 2.613(C); *Cipri, supra* at 8. Clear error exists where we are left with the definite and firm conviction that a mistake has been made. *Schadewald v Brulé*, 225 Mich App 26, 41; 570 NW2d 788 (1997). Plaintiff has not demonstrated that the court's finding was clearly erroneous. Because the arbitrators all participated fully in the deliberations, plaintiff has not demonstrated that the arbitrators acted outside the scope of their authority, or that plaintiff was denied due process. Moreover, to constitute misconduct justifying vacating an arbitration award, an arbitrator must be actually excluded from deliberations. *Bradley v Allstate Ins Co*, 133 Mich App 116, 120; 348 NW2d 51 (1984). Plaintiff has not demonstrated actual exclusion, and plaintiff agreed to the method employed by the arbitrators. "This Court is reluctant to become involved in reviewing the methods of deliberations used by arbitrators in reaching their decisions." *Id.* In this case, we find no basis for finding that the trial court erred by refusing to vacate the arbitration award.

On cross appeal, defendant argues that the trial court erred by refusing to impose sanctions on plaintiff under MCR 2.114 for bringing a frivolous claim. "The imposition of a sanction under MCR 2.114 is mandatory upon the finding that a pleading was signed in violation of the court rule or a frivolous action or defense had been pleaded." *Schadewald, supra* at 41. The trial court's determination whether a claim is frivolous is reviewed for clear error. *Szymanski v Brown*, 221 Mich App 423, 436; 562 NW2d 212 (1997). We conclude that the trial court did not clearly err.

Under MCR 2.114, a signature on a document certifies that a reasonable inquiry into the claim has been made, that the claim is well grounded in law and fact, and that the claim has not been brought for any improper purpose. Defendant argues that plaintiff's motion to vacate the arbitration award was brought without reasonable inquiry. Specifically, defendant challenges plaintiff's claim that one of the arbitrators was excluded from deliberations. Defendant argues that all plaintiff did was to compare the billing statements of the arbitrators for discrepancies. Defendant asserts that, had plaintiff investigated further, it would have discovered the neutral arbitrator's explanation of his billing practices, which resolves the billing discrepancy. However, even if plaintiff had known of the explanation, its motion to vacate the award was not frivolous. Whether the arbitrator's explanation was credible was an arguable question of fact. Defendant has failed to demonstrate that the trial court clearly erred in finding that plaintiff's motion was not frivolous.

Defendant also argues that the trial court erred by refusing to impose sanctions on plaintiff for misconduct. A trial court has inherent authority to impose sanctions for the misconduct of a litigant. *Persichini v William Beaumont Hospital*, ___ Mich App ___; ___ NW2d ___ (Docket No. 207377, issued 11/30/1999), slip op at 6; *Prince v MacDonald*, 237 Mich App 186, 189; 602 NW2d 834 (1999). The trial court's decision whether to exercise that power is reviewed for a clear abuse of discretion. *Persichini, supra*, slip op at 7; *Carpenter v Consumers Power Co*, 230 Mich App 547, 557; 584 NW2d 375 (1998), lv gtd 461 Mich 880 (1999). We find no clear abuse of discretion.

Before the arbitrators' decision was issued, a risk manager employed by plaintiff contacted the neutral arbitrator, expressing displeasure at the decision to find plaintiff at fault, imploring the arbitrators to discuss the matter further, and implying that the decision would destroy the confidence of all railroad companies in arbitration. Defendant argues that this ex parte communication merits the imposition of a sanction equal to the amount of the judgment. In other words, defendant seeks a sanction of over two million dollars.

The trial court refused to impose a sanction, finding that the communication occurred after the decision was made and merely voiced plaintiff's objections to the decision. However, the trial court seemed to ignore that the communication occurred *before* the arbitrators' decision was released, although the contents of the communication clearly demonstrate that plaintiff knew what the decision was. Therefore, the communication was an improper ex parte communication with an arbitrator. See Rule 29 of the Commercial Arbitration Rules of the American Arbitration Association (prohibiting direct communication between a party and a neutral arbitrator). See also MRPC 3.5 (prohibiting ex parte communications with a judge, juror, or other official). Although an arbitrator is not a judge, an arbitrator's function is quasi-judicial. *Boraks v American Arbitration Ass'n*, 205 Mich App 149, 151; 517 NW2d 771 (1994); *International Union v Greyhound Lines, Inc.*, 701 F2d 1181, 1185 (CA 6, 1983). Plaintiff's communication with the neutral arbitrator was improper.

However, the misconduct in this case occurred during arbitration, not during litigation in the trial court. The court's inherent power to impose sanctions for litigant misconduct is "based on a court's fundamental interest in protecting its integrity and that of the judicial system." *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997). Here, although the integrity of the arbitration process was affected, the integrity of the trial court or the judicial system was not. We doubt whether the trial court even had the authority to impose sanctions for misconduct that occurred before the arbitration panel. In cases where this Court has affirmed the imposition of sanctions for misconduct, the misconduct occurred before the trial court. See, e.g., *Persichini, supra*, slip op at 1-2, 7 (sanction imposed where attorney's improper question resulted in a mistrial); *Prince, supra* at 188, 190-190, 196 (sanction imposed where bankruptcy petition filed the day before trial in order to interfere with the trial court's proceeding). In any event, even if the trial court had the authority to impose sanctions in this case, it was within its discretion to refuse to do so. Although the communication occurred before the final decision was released, the deliberations had concluded. Plaintiff had apparently been informed of the results of those deliberations. The communication did not affect the deliberative process whatsoever. Under these circumstances, it was not a clear abuse of discretion for the trial court to refuse to impose sanctions.

Defendant also argues that the trial court erred by refusing to award attorney fees under Interchange Rule 120(E) of the Association of American Railroads. The trial court's decision whether to award attorney fees is reviewed for an abuse of discretion. *First Security Savings Bank v Aitken*, 226 Mich App 291, 319; 573 NW2d 307 (1997), overruled in part on other grounds 460 Mich 446, 455 n 2 (1999). We find no abuse of discretion.

Defendant claims that Rule 120(E) was a contractual provision between the parties that would allow attorney fees to be awarded where litigation is required to enforce the arbitration award.

Contractual provisions for attorney fees are judicially enforceable. *Id.*; *Central Transport, Inc v Fruehauf Corp*, 139 Mich App 536, 548; 362 NW2d 823 (1984). However, the parties' arbitration agreement only provides that the parties agreed to submit their dispute to arbitration under the Commercial Rules of the AAA. The agreement does not provide that the parties are bound by Rule 120 of the Association of American Railroads.

Defendant argues that the parties agreed at the arbitration hearing to be bound by Rule 120. However, a review of the transcript of that hearing reveals that the arbitrators were merely attempting to verify that the parties intended that the arbitrators' decision would be binding. Plaintiff's counsel did not agree that the arbitration was conducted under Rule 120, but did affirm that the decision would be binding pursuant to the terms of the arbitration agreement. Therefore, defendant's assertion is not supported by the record.

Because we conclude that Rule 120(E) was not included in the parties' agreement, we express no opinion whether Rule 120(E) would even operate to require an award of attorney fees in this case. The trial court did not abuse its discretion by refusing to award attorney fees.

Finally, defendant argues that the trial court erred by failing to rule on its motion to strike certain deposition testimony from plaintiff's pleadings. Defendant moved to have any references to the testimony stricken because the testimony was not presented to the arbitrators. However, defendant has failed to specify what relief it seeks from this Court, if any. Even assuming that the trial court should have granted defendant's motion to strike, any error would be harmless. The disputed testimony involves an expert opinion regarding the defects that caused the derailment. The trial court specifically refused to review the merits of the arbitrators' decision regarding the causes of the derailment. Indeed, plaintiff's motion to vacate the award was denied. We discern no relief necessary or available to defendant on this issue.

Affirmed.

/s/ Jane E. Markey

/s/ Peter D. O'Connell